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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/068,963	02/11/2002	Philip Rodney Kwok	P 290534	2378
23117	7590	06/14/2004	EXAMINER	
NIXON & VANDERHYE, PC 1100 N GLEBE ROAD 8TH FLOOR ARLINGTON, VA 22201-4714			EREZO, DARWIN P	
			ART UNIT	PAPER NUMBER
			3761	

DATE MAILED: 06/14/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/068,963

Applicant(s)

KWOK ET AL.

Examiner

Darwin P. Erez

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 29 April 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 23-99 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 23-99 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Response to Amendment***

1. Applicant's request for reconsideration of the finality of the rejection of the last Office action is persuasive and, therefore, the finality of that action is withdrawn.

### ***Claim Rejections - 35 USC § 112***

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claim 27 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

4. Claim 27 is dependent from cancelled claim 21, which renders the claim indefinite.

### ***Double Patenting***

5. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

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Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

6. Claims 23-31, 54 and 82 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 13, 6-18 and 23 of U.S. Patent No. 6,701,927. Although the conflicting claims are not identical, they are not patentably distinct from each other because each structural limitation claimed in the instant application is also claimed in the patent.

7. As to claim 23 of the instant application, claim 13 of the patent recites all the limitations of the claim except for a triangularly-shaped frame. However, it would have been obvious to one of ordinary skill in the art at the time the invention was made to replace "triangularly-shaped membrane" with "triangularly-shaped frame" since the claimed limitations are obvious variations of the same structure.

8. As to claim 24 of the instant application, see claim 16 of the patent.

9. As to claims 25, 27-29 of the instant application, see claim 18 of the patent. The membrane forms a seal and has a nose-receiving cavity, which inherently seals over all parts of the nose.

10. As to claim 26 of the instant application, see claim 17 of the patent.

11. As to claims 30 and 31 of the instant application, see claim 13 of the patent.

12. As to claims 54 and 82 of the instant application, see claim 23 of the patent.

The patent claim recites all the structural limitations of claims except for minor but obvious variations in the claimed functional limitations.

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13. Claims 32-53, 62-81 and 90-99 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 34, 35, 49, 52-56 and 69-72 of U.S. Patent No. 6,634,358. Although the conflicting claims are not identical, they are not patentably distinct from each other because each structural limitation claimed in the instant application is also claimed in the patent.

14. As to claims 32, 34, 36, 38 of the instant application, see claim 34 of the patent. The patent claim recites all the structural limitations of the claims of the instant application except for minor but obvious variations in the claimed functional limitations.

15. As to claims 33, 35, 37, 39 of the instant application, see claim 35 of the patent.

16. As to claims 40, 46, 62, 68, 74, 90 of the instant application, claim 49 of the patent teaches all the structural limitations of the claim with minor but obvious variations, such as, a saddle shaped membrane to a triangularly shaped membrane.

17. As to claims 41-45 of the instant application, see claims 52-56 of the patent.

18. As to claims 47-53 of the instant application, see claims 50-56 of the patent.

19. As to claims 63-67 of the instant application, see claims 52-56 of the patent.

20. As to claims 69-73 of the instant application, see claims 52-56 of the patent.

21. As to claims 75-81 of the instant application, see claims 50-56 of the patent.

22. As to claims 91-95 of the instant application, see claims 52-56 of the patent.

23. As to claims 96-99 of the instant application, see claims 69-72 of the patent

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24. Claims 55-61 and 83-89 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 23 of U.S. Patent No. 6,701,927 ('927) in view of claims 50-56 of U.S. Patent No. 6,634,358 ('358).

The '927 patent teaches all the limitations of the claim except for claims 55-61 and 83-88 of the instant application. However, the '358 patent recites said limitations in claims 50-56. Therefore, it would have been obvious to one of ordinary skill in the art to add said limitations of the '358 patent to the invention claimed in the '927 patent since at the art at the time the invention was made both inventions were commonly owned and would be obvious variations of the claimed inventions.

### ***Response to Arguments***

25. Applicant's arguments with respect to claims 23-99 have been considered but are moot in view of the new ground(s) of rejection. The Double Patenting section has been restated to further clarify the rejections.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Darwin P. Erez who's telephone number is (703) 605-0420. The examiner can normally be reached on M-F (8:30-5:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, McDermott or Shaver can be reached on (703)308-0858. The fax phone

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number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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GLENN K. DAWSON  
PRIMARY EXAMINER